(2)

88-971

SUPPLEMENT REQUESTED

FILED
MAY 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

No.

IN RE: BERNARD J. DOLENZ

*Petitioner,*

## APPENDIX

PETITION FOR A WRIT OF MANDAMUS,
OR A WRIT OF PROHIBITION, OR BOTH
REGARDING JURISDICTION

Bernard J. Dolenz
6102 Swiss Avenue
Dallas, Texas 75214

Pro Se

## APPENDIX

| Page | Instrument | Date |
|---|---|---|
| | PER THE CLERK'S CONVERSATION REGARDING TYPE SIZE, THIS IS THE APPENDIX IN PERTINENT PART FROM THE REDUCTIONS OF THE ORIGINAL INSTRUMENTS. | |
| | Prayer | |
| 18 | Claim of Bernard J. Dolenz | 04/03/87 |
| 30 | Order: Deny Writ of Mandamus | 10/21/87 |
| 31 | Motion to Rehear Mandamus | 10/26/87 |
| 34 | Order: Deny Motion to Rehear Mandamus | 01/27/88 |
| 35 | Order: Deny Motion for Hearing RE: Jurisdiction | 02/11/88 |
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| 73 | Petition for Writ of Prohibition and/or Writ of Mandamus | 10/01/87 |

## PRAYER

Petitioner prays of this Honorable United States Supreme Court that:

1. A Writ of Mandamus or a Writ of Prohibition be issued by this Court directed to the Honorable William J. Zloch to dismiss the case as the Court lacks jurisdiction;

2. The Eleventh Circuit Appeals Court ruling on the Motion for Re-Hearing on Petition for Writ of Prohibition and/or Writ of Mandamus be corrected affirmatively for the owner of the Defendant vessel;

3. The Defendant vessel be released to the Petitioner without impediment for its placement into the water;

4. For Rule 11 Sanctions against the Plaintiff;

5. For General Relief.

(CAPTION)-U.S. DISTRICT COURT

CLAIM OF BERNARD J. DOLENZ

COMES NOW, BERNARD J. DOLENZ, and presents his claim as follows:

1. BERNARD J. DOLENZ is the owner of the seized property identified as the "ARIES STARTREK, ENROLLMENT NO. 555798, TOGETHER WITH ALL TACKLE AND APPAREL", of said vessel. On March 14, 1987, an agent of Melissa Keyes gave an oral assignment of the above seized property to Bernard J. Dolenz in Dallas, TX which was ratified subsequently by Melissa Keyes, said assignment being notorized March 23, 1987, and being delivered in Dallas, TX on March 26, 1987 to Bernard J. Dolenz.

2. BERNARD J. DOLENZ is the owner of the aformentioned vessel and any of its

tackle, apparel, appurtenances and other equipment in the possession of the Plaintiff, both at the shipyard at 450 Southwest Salerno Road, Stuart, Florida, 33494, the Mini Bay Use Storage, at 1105 N.E. Industrial Boulevard, Jensen Beach, Florida, storage bin no. 199 and any other location to which any of the appurtencances, tackle and other equipment at whatever location said equipment has been removed and placed.

3. BERNARD J. DOLENZ, as the owner of the "ARIES STARTREK" and its tackle, appurtenances, apparel and equipment demands its restitution and the right to defend this action.

_____

Bernard J. Dolenz

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 87-5862

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IN RE:

BERNARD J. DOLENZ,

Petitioner.

(Filed October 21, 1987 in the U.S. Court of Appeals, Eleventh Circuit by Miguel J. Cortez - Clerk).

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On Petition for Writ of Mandamus to the United States District Court for the Southern District of Florida

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Before HILL and FAY, Circuit Judges.

The Petition for Writ of Mandamus is denied.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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NO. 87-5862

---

IN RE:

BERNARD J. DOLENZ,

Petitioner.

MOTION FOR REHEARING ON

PETITION FOR WRIT OF PROHIBITION AND/OR

WRIT OF MANDAMUS

TO THE HONORABLE JUSTICES OF SAID COURT:

1. Petitioner, Bernard J. Dolenz, moves for a Rehearing on the Petition for Writ of Prohibition and/or Writ of Mandamus, and would show as grounds as follows:

2. Lack of jurisdiction may be raised at any time, even upon a second appeal of an action in which the point was never raised in the trial court, and was not advanced in a previous appeal, FLOTA MARITIMA

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BROWNING DE CUBA, SOCIADAD ANONINA V. SNOBL, 363 F2d 733 (CA4 Md, 1966), cert, den. 385 US 837, 87 S. Ct. 82, 17 L Ed 2d 71, and when raised must be examined and decided, ARMSTRONG CORK CO. V. FARRELL LINE, INC., 81 F. Supp 848, (DC Pa, 1948).

3. The Zloch Court has no jurisdiction, and if so has never ruled on it, and for what reasons. There is no underpinning of a Maritime contract as the vessel has never been finished or commissioned, as admitted by the Plaintiff.

4. The U.S. Marshall of the same Court in his Process Service of July 10, 1986 states: "ARRESTED THE ABOVE OCEAN GOING CATAMARAN C SEE ATTACHED INVENTORY. VESSEL IS INCOMPLETE, UNDER CONSTRUCTION, AND EMPTY OF EQUIPMENT" (Emp. added). See Exhibit "A".

5. Mandamus is appropriate to restrict the lower court to authorized exercise of jurisdiction, KERR V. U.S. DIST. COURT FOR

NORTHERN DIST., 426 U.S. 394, 96 S. Ct. 2119, 48 L. Ed 2d 725 (1976) and to compel the lower court to exercise its authority when there is a duty to do so, EX PARTE BURTIS, 103 U.S. 238, 26 L. Ed 392 (1881). Mandamus is also appropriate to compel the lower court's compliance with prior mandates. This vessel is unfinished, and services on an unfinished vessel do not provide a basis for a claim within the admiralty jurisdiction provided for in 28 USCS Section 1333 (1). BOND V. F/V MERMAID, 311 F. Supp 1013, DC Fla. 1970.

WHEREFORE PREMISES CONSIDERED, Petitioner requests this Court to reconsider and rehear this Petition, and render an opinion that this case is without jurisdiction, and should be dismissed in the United States District Court for the Southern District of Florida.

Respectfully submitted,

Bernard J. Dolenz

CERTIFICATE OF SERVICE

A copy of the foregoing instrument was sent this 26th day of October 1987 to William J. Zloch, U.S. District Judge, Room 202B, 299 East Broward Blvd., Fort Lauderdale, FL 33301, and to Steven Perry, P. O. Drawer 24, Stuart, FL 33497-0024.

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Bernard J. Dolenz

(PERTINENT PART OF U.S. MARSHALLS RETURN)

Name and title of individual served:

BURDICK

Date of Service
7/10/86

Time of Service
6:00 p.m.

Signature of U.S.
Marshall
S/S
Randolf Fuedeal
(sp)

REMARKS: 7/10/86 ARRESTED THE ABOVE OCEAN GOING CATAMARAN (SEE ATTACHED INVENTORY). VESSEL IS INCOMPLETE, UNDER CONSTRUCTION AND EMPTY OF EQUIPMENT.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

---

NO. 87-5862

(Filed January 27, 1988 in the U.S. Court of Appeals, Eleventh Circuit by Miguel J. Cortez - Clerk).

IN RE: BERNARD J. DOLENZ, Petitioner.

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On Petition for Writ of Mandamus or Prohibition to the United States District Court for the Southern District of Florida

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Before HILL and FAY, Circuit Judges. BY THE COURT:

Petitioner's "Motion for Rehearing", construed as a Motion to Reconsider this Court's Order of October 21, 1987, is DENIED.

Petitioner's Motion to Expedite is DENIED AS MOOT.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-8384-CIV-ZLOCH

STUART YACHT BUILDERS, INC.
a Florida corporation,

Plaintiff,

v. ORDER

ARIES STARTREK, ENROLLMENT
NO. 555798, TOGETHER WITH
ALL TACKLE AND APPAREL,

Defendant.

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THIS MATTER is before the Court upon the Motion for Hearing Regarding Jurisdiction (DE 47) filed herein by Bernard J. Dolenz. The Court has carefully considered the merits of said Motion, has carefully reviewed the court file and after due consideration, it is

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ORDERED AND ADJUDGED that the Motion For Hearing Regarding Jurisdiction (DE 47) filed herein by Bernard J. Dolenz be and the same is hereby DENIED.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 11th day of February, 1988.

_____

William J. Zloch
U.S. District Judge

Copies furnished:
Bernard J. Dolenz
Steven Perry, Esquire

(Filed February 11, 1988 with Robert M. March - Clerk U.S. District Court).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-8384-CIV-ZLOCH

STUART YACHT BUILDERS, INC.
a Florida Corporation,

Plaintiff,

v. ORDER

ARIES STARTREK, ENROLLMENT
NO. 555798, TOGETHER WITH
ALL TACKLE AND APPAREL,

Defendant.

---

THIS MATTER is before the Court upon the Motion For Hearing (DE 44) filed herein by Bernard J. Dolenz, and the Court having carefully considered the merits of said Motion, having reviewed the court file and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that the Motion For

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Hearing (DE 44) filed by Bernard J. Dolenz be and the same is hereby DENIED.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 15th day of January, 1988.

William J. Zloch
U.S. Dist. Judge

Copies furnished:

Steven L. Perry, Esq.

Bernard J. Dolenz, J.D., M.D.
6102 Swiss Avenue
Dallas, TX 75214

(Filed January 15, 1988 with Robert M. March - Clerk U.S. District Court).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-8384-CIV-ZLOCH

STUART YACHT BUILDERS, INC.
a Florida Corporation,

Plaintiff,

v. FINAL JUDGMENT

ARIES STARTREK, ENROLLMENT
NO. 555798, TOGETHER WITH
ALL TACKLE AND APPAREL,

Defendant.

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THIS MATTER was tried before the court, without a Jury, on March 16, 1987.

In addition, presently before the court is a Motion For The Award of Costs And Attorneys' Fees (DE 33) filed herein by the Plaintiff, Stuart Yacht Builders, Inc. Present for the bench trial on March 16, 1987 were counsel for the Plaintiff and Ms. Melissa Keyes. Ms. Keyes had filed a

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Claim (DE 13) claiming that she was the owner of the seized property. The Claim bore Ms. Keyes signature, was notorized and "sworn to".

Prior to the commencement of trial, Ms. Keyes stated in open court that she had transferred all of her ownership interest in the Defendant vessel to Mr. Bernard Dolenz on March 15, 1987. Ms. Keyes handed up to the Court a copy of the written "Assignment" dated March 15, 1987. She further stated that she had no further interest in said vessel. These representations were not disputed by her lawyer and indeed, formed the basis for the ore tenus Motion To Withdraw as counsel for Ms. Keyes and the Defendant vessel made by the law firm of Roberts & Reynolds in open court. This Court is its Order (DE 24) dated March 19, 1987, granted the ore tenus Motion to Withdraw. As is reflected in this Court's prior

Order (DE 24), at no time was Mr. Bernard Dolenz present in court and at no time did any individual appear on his behalf. Ms. Keyes stated that she was not authorized to represent Mr. Dolenz or to speak on his behalf but that she had spoken with him over the course of the previous weekend and that Mr. Dolenz was aware of the date of trial and "hoped" for a continuance. At no time prior to trial did Mr. Dolenz or any representative of Mr. Dolenz request a continuance of the trial of this matter.

Ms. Keyes further advised the Court that Mr. Dolenz had not and did not wish to retain Ms. Keyes' counsel of record to represent the Defendant vessel in the above-styled cause. Ms. Keyes further stated to the Court that Mr. Dolenz would represent himself. Additionally, Ms. Keyes stated that she discharged the law firm of Roberts & Reynolds and Mr. Lyman

Reynolds, Jr., Esquire, her counsel of record from any further representation of her and the Defendant vessel in this cause.

This Court is not asked to pass upon the validity of the hand-written "Assignment" and no comment is made by the Court on that issue. However, assuming arguendo that the "Assignment" is valid, this Court notes that Bernard Dolenz had notice of this bench trial and for whatever reasons chose not to appear. Assuming arguendo that the "Assignment" is not valid, then Ms. Keyes was present and in court during the entire bench trial and for whatever reasons chose to discharge her lawyer and further chose not to proceed in the matter or to put on any testimony or evidence in support of her claim.

Accordingly, the Court proceeded with the bench trial of this cause, there being no good and sufficient reason to continue

same.

The Plaintiff presented documentary evidence and testimony through witnesses, Mr. Gregory Burdick and Mr. Raymond Seese. Subsequent to the bench trial, counsel for the Plaintiff filed Motion For The Award Of Costs And Attorney's Fees (DE 33), attaching to said motion as Exhibit "A" an itemization of all time spent and the charges for same; Exhibit "B", which is a supporting Affidavit for attorney's fees; Exhibit "C", an Affidavit with respect to time spent by counsel for the Plaintiff; and Exhibit "D" which is an Affidavit of Costs.

At the conclusion of the Plaintiff's case and after the Plaintiff rested, the Court called the case of the Defendant or any claimant. There was no response and no individual appeared in the courtroom on behalf of the Defendant and, although present in the courtroom during the ENTIRE

proceeding, Ms. Keyes did not come forward and put on any testimony or evidence.

The Court notes that Bernard J. Dolenz represents himself to be a lawyer in the State of Texas as well as a medical doctor.

Based on the testimony presented by the Plaintiff, the documentary evidence received by the Court, and the Court having reviewed the court file makes the following findings of Fact and Conclusions of Law. To the extent that any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such. Conversely, to the extent that any of the following Conclusions of Law constitute Findings of Fact, they are adopted as such.

FINDINGS OF FACT

1. Pursuant to the testimony at trial, the documentary evidence and the Claim (DE 13) filed by Melissa Keyes, the Court

finds that Melissa Keyes at all times material was the owner of the vessel, Aries Startrek, and that all necessaries provided said vessel were ordered by the owner or the owner's authorized agent.

2. Stuart Yacht Builders and Melissa Keyes entered into an agreement to perform services on the vessel Aries Startrek on July 1, 1985. (Plaintiff's Exhibit No. 3).

3. Stuart Yacht Builders agreed to dry dock the "Aries" at the rate of $216.00/month from 11/01/85 to 12/02/86 and $432.00/month thereafter. (Plaintiff's Composite Exhibit No. 6).

4. The services were performed to return the vessel to proper navigational condition.

5. The services were performed in a workmanlike fashion and the time expended was reasonable.

6. All unpaid sums accrued interest at

the rate of 18% per annum. (Plaintiff's Exhibit Nos. 3, Composite 6, and 19).

7. On July 3, 1986 process of warrant for arrest of the "Aries" its tackle and apparel, was issued.

8. On July 10, 1986 process was served on the vessel and its tackle by the U.S. Marchal and custody relinquished to Greg Burdick as Court Appointed Substitute Guardian.

9. As substitute custodian, Stuart yacht Builders provided maintenance, storage, security and bookkeeping services for the "Aries".

10. In accordance with the work authorization, Stuart Yacht Builders provided Ship Repair Liability Insurance for the "Aries". (Plaintiff's Exhibit Nos. 3 and Composite 6).

11. In accordance with the work authorization, Stuart Yacht Builders provided Hull Liability Insurance for the

"Aries". (Plaintiff's Exhibit Nos. 3, Composite 6 and 19).

12. In accordance with this Court's Order of July 3, 1986 appointing Stuart Yacht Builders Substitute Custodian, Hull Liability Insurance was provided for the "Aries". (Plaintiff's Exhibit Nos. Composite 6 and 19).

13. As Substitute Custodian, Stuart Yacht Builders paid all storage charges for the warehouse containing the "Aries" tackle and apparel. (Plaintiff's Exhibit Nos. Composite 6 and 19).

14. The "Aries Startrek" is a vessel within the meaning of 46 U.S.C. Section 971.

15. No testimony or physical or documentary evidence was presented by the Defendant or any Claimant.

16. The Court finds that the following costs incurred by the Plaintiff, through its attorney are authorized by law:

| | |
|---|---|
| Clerk, U. S. District Court - Filing custodial bond | $ 500.00 |
| U.S. Marshal Arrest vessel | 1,000.00 |
| Marshal's Insurance/fees | 1,000.00 |
| Stuart News Notice of Publication | 22.10 |
| TOTAL | $2,522.10 |

CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to 28 U.S.C. Section 1333.

2. This is an Admiralty and Maritime Claim within the meaning of Rule 9(h).

3. The Plaintiff is a corporation doing business in the Southern District of Florida.

4. The vessel subject to this action is within the jurisdiction of this court and the Court has jurisdiction over same.

5. The "Aries Startrek" is a vessel within the meaning of 46 U.S.C. Section 971.

6. The services, repairs, drydock and necessaries furnished by the Plaintiff are within the scopy of 46 U.S.C. Section 971.

7. The services, repairs, drydock and necessaries were furnished by the Plaintiff upon the authority of a person within the scope of 46 U.S.C. Section 972.

8. A rebuttable presumption of a maritime lien is created by the furnishing of necessareies ordered by the owner or the owner's authorized agent. BELCHER OIL COMPANY V. M/V GARDENIA, 766 F2d 1508 (11th Cir. 1985); 46 U.S.C. Section 971.

9. The Defendant and the owner (Claimant) have not overcome the rebuttable presumption of a maritime lien and have failed to satisfy their burden of proof in establishing that the providing of the necessaries was not authorized to bind the vessel or the owner.

10. The Plaintiff is entitled to a maritime lien pursuant to 46 U.S.C.

Section 971 and to a judgment foreclosing the lien.

11. The Plaintiff is entitled to recover reasonable CUSTODIA LEGIS expenses.

12. Absent some statutory aughorization, the prevailing party in an admiralty case is not generally entitled to an award of attorneys' fees. NORITAKE CO., INC. V. M/V HELLENIC CHAMPTION, 627 F. 2d 724 (5th Cir. 1980). Therefore, no attorneys' fees will be awarded to the Plaintiff in this matter.

Accordingly, it is

ADJUDGED that the Plaintiff, Stuart Yacht Builders, Inc., a Florida corporation, shall recover against the Defendant, Aries Startrek, Enrollment No. 555798, together With All Tackle And Apparel, the following sums:

a. Sales tax with interest due through 3/16/87 $1,719.61

b. Repair insurance with interest due

through 3/16/87 477.87

c. Hull insurance with interest due through 3/16/87 3,904.83

d. "Mini Bay" storage with interest due through 3/16/87 882.67

e. Storage charges with interest due through 3/16/87 7,085.72

f. Labor and material with interest due through 3/16/87 22,307.08

g. Additional costs incurred as Substitute Custodian

(i) routine maintenance 952.00

(ii) bookkeeping expenses 420.00

h. Court costs 2,522.10

TOTAL DUE THROUGH TRIAL-3/16/87 $38,899.88

IT IS FURTHER ADJUDGED that prior to the time set for sale below, the vessel may be redeemed by paying a total of the sums due to the Plaintiff, together with interest at a rate of twleve (12%) percent per annum and all costs of this action accruing subsequent to this Judgment. If

the Plaintiff is not paid prior to the time set for the sale, then the Marshal of This Court shall sell the vessel on the _____ day of _____, 1988 at _____ o'clock ___.m. to the highest bidder for cash, except as set forth hereinafter.

Prior to the above-referenced sale date, the Marshal shall have filed with This Court and provided a copy to counsel of record, proof of compliance with Local Rule 4 regarding publication of the Notice of Sale. Upon holding the sale, a single Certificate of Sale, Certificate of Title and Certificate of Disbursement shall be filed as to the vessel sold and the proceeds of the sale shall be applied to the Judgment of Record and to satisfy any costs incurred by the Plaintiff subsequent to the Judgment. In the event that there is an excess above and beyond the Judgment and costs, this amount shall be placed in the registry of the Court to be disbursed

upon the application of the individuals claiming to be the owners of the vessel at the time this Judgment was entered.

IT IS FURTHER ADJUDGED that the Plaintiff shall advance all subsequent costs of this action and shall be reimbursed for them by the clerk if the Plaintiff is not the purchaser of the vessel. If the Plaintiff is not the purchaser of the vessel, the clerk shall credit the Plaintiff's bid with the total sums due pursuant to the Judgment together with interest and any costs incurred subsequent to judment.

On the filing of the Certificate of title, all named Defendants to this action and all persons claiming under or against those Defendants since the filing of the original Proof of Publication in this action shall be foreclosed of all claims and interest in the vessel the "Aries Startrek" as fully described in the Certificate of Title, and the purchaser at

the sale shall be let in possession of the vessel.

IT IS FURTHER ADGUDGED that jurisdiction of this action is retained for the purpose of entering such further Orders as may be necessary and proper including with limitation writs of possession.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 16th day of February, 1988.

William J. Zloch
U.S. District Judge

Copies furnished:

Steven Perry, Esquire

Melissa Keyes
c/o Turks Island Divers
Hotel Kittina
P. O. Box 42, Grand Turk
Turks and Caicos, British West Indies

or

P. O. Box 281

Deltaville, Virginia 23043

or

816 Southeast Ninth Street

Deerfield Beach, Florida 33441

or

Box 266781, West Oakland Park Blvd.

Fort Lauderdale, Florida 33311

U.S. Marshals Service

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT

BERNARD J. DOLENZ,

Petitioner,

V. NO. 87-5862

HONORABLE WILLIAM J. ZLOCH, JUDGE OF THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA,

Respondent.

PETITION FOR WRIT OF PROHIBITION AND/OR WRIT OF MANDAMUS

The above named petitioner, Bernard Dolenz, herein applies, pursuant to Section 1651, Title 28, United Stated Code, and Rule 21 (a) of the Federal Rules of Appellate Procedure, for a writ of mandamus or, in the alternative, for a writ of prohibition, directed to the above

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named respondent, the Honorable William J. Zloch, Judge of the U.S. District Court, Southern District of Florida. In support of this application petitioner states:

ORDER AND OPINION BELOW

On September 25, 1987, Respondent made and entered an order denying the Motion for intervention, the Motion to Dismiss because of lack of jurisdiction, the Motion to Reconsider, and Motion for Rule 11 Sanctions. A copy of the Order is attached as Exhibit "A".

STATEMENT OF FACTS

The facts necessary to an understanding of the issues presented by this application are as follows:

1. Melissa Keyes entered into an agreement with Plaintiff Stuart Yacht Builders, Inc. to do some design, engineering, exploratory carpentary, and replacement of inappropriate gear boxes and propellers among other things

(H9-H14) on an unfinished and uncommissioned "vessel". Ray Seese, Marine Surveyer for the Plaintiff admits that the vessel has never been completely finished or commissioned (G4), and the owner of Stuart Yacht likewise made similar statements (G6).

2. The work was not done satisfactorily (J14-J17) with exorbitant charges, which was controverted and not paid, about which Plaintiff sued in Admiralty in rem, even though the Plaintiff knew that the boat was never commissioned or finished.

3. While the suit was pending, Melissa Keyes transferred and assigned the Defendant "vessel", AIRES STARTREK to Bernard Dolenz, notarizing same March 23, 1987 and delivering same to Dolenz in Dallas, Texas on March 26, 1987. (I). The Notice of Motion for Intervention was sent March 18 (J19), being sent with supporting documents by Express Mail (J1).

A Claim of ownership was sent April 3 (H17).

4. Several requests were made of the Court to dismiss this case because of lack of jurisdiction beginning March 18 (J), April 4 (H), April 18 (G), with repeated requests of the Court's clerk and secretary to set a hearing because of deterioration and irrepairable harm befalling the vessel because of its exposure to the sun and warping due to inaction (C & B).

5. Efforts to resolve the matter amicably were resistd by the Plaintiff; even after pointing out the jurusdiction issue, the Plaintiff and his attorney persisted in the prosecution in Federal Court. Accordingly, Rule 11 Sanctions were requested of the Court under the circumstances. (D,E,F). The Court gave no hearing regarding the Rule 11 Motion for Sanctions. The court has not rendered

a final judgment.

STATEMENT OF ISSUES

The issues involved are:

1. TO RESTRICT THE LOWER COURT TO AUTHORIZED EXERCISE OR JURISDICTION.

Here the Petitioner feels strongly that the Zloch Court does not have jurisdiction as there is no underpinning of a Maritime contract since the "vessel" has never been finished or commissioned as the Plaintiff readily admits.

The Supreme Court has expressly recognized that the writ is an appropriate remedy to restrict a lower court to a proper exercise of its prescribed jurisdiction. KERR V. U.S. DIST. COURT FOR NORTHERN DIST. (1976) 426 U.S. 394, 48 L. E. 2d 725, 96 S.Ct. 2119.

In EX PARTE REPUBLIC OF PERU (1943), 318 U.S. 578, 87 L Ed 1014, 63 S. Ct. 793, where the Supreme Court dealt with a motion for leave to file a petition for a

writ of mandamus restraining a judge of a Federal District Court from the further exercise of unauthorized admiralty jurisdiction over a vessel, the court stated that insofar as the purpose of a writ of mandamus directed by an appellate court to an inferior court is to exert revisory appellate power over the inferior court, the writ affords an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction.

2. TO COMPEL LOWER COURT TO EXERCISE ITS AUTHORITY WHEN THERE IS A DUTY TO DO SO.

In EX PARTE BURTIS (1881), 103 U.S. 238, 26 L. Ed 392, the court stated the "elementary"rule that the writ of mandamus may be used to compel an inferior tribunal to act on a matter within its jurisdiction, as regarded such rule as fully applicable in the determination of whether mandamus is available to control

the conduct of a lower federal court in a civil action.

KERR and EX PARTE PERU, supra, also elaborate on this premise.

3. TO COMPEL LOWER COURT'S COMPLIANCE WITH PRIOR MANDATES.

Where a lower Court has failed to comply with the Supreme Court's or other Appellate Court's prior mandate in a case, the writ of mandamus is an appropriate remedy to compel such compliance. PERKINS V. FOURNIQUET (1853) 55 U.S. 328, 14 L. Ed 441; BALTIMORE & O.R. CO. V. U.S., (1929) 279 U.S. 781, 73 L Ed 954, 49 S. Ct. 492. Here services on an unfinished vessel do not provide a basis for a claim within the admiralty jurisdiction provided for in 28 USCS Section 1333 (1). BOND B. F/V MERMAID (1970, DC Fla), 311 F. Supp 1013.

REASONS WHY WRIT SHOULD ISSUE

1. This Court has jurisdiction to issue the Extraordinary Writs prayed for by

virtue of the "All Writs Statute," 28 USC Section 1651.

2. The damage to the Petitioner and the "vessel" is real and immediate as it is deteriorating and warping as it is not receiving even maintenance care to its planks and engines which need periodic start up.

3. The delay involved, even by an expedited appeal herein, is not warranted under the circumstances, and will result in additional irrepairable injury to Petitioner if it is required to wait for normal appellate review.

4. The Order has so far departed from the accepted and proper course of judicial proceedings as to call fo an exercise of this court's exercise of supervision, particularly in view of the continuing damages being sustained.

STATEMENT OF RELIEF SOUGHT

The relief sought by Petitioner herein is

as follows:

1. Petitioner askes this Court to prohibit respondent and the other judges and officers of that court from further exercise of jurisdiction over a proceeding in rem pending in that court against Petitioner's unfinished and noncommissioned vessel, ARIES STARTREK, and to direct the district judge to enter an order in the proceeding declaring the vessel is immune from suit in Admiralty as there is no jurisdictional basis.

2. That Rule 11 Sanctions be imposed upon the Plaintiff for wrongful arrest and attorney's fees expended in defending a case, which Plaintiff and his attorney knew was without jurisdiction or merit in Admiralty.

EXHIBITS

EXHIBITS "A" through "J" with subparts are incorporated by reference herein, and have been alluded to in the Statement of Facts

and are available for a better understanding of the matters set forth in this petition.

WHEREFORE, Petitioner respectfully prays that a writ of mandamus or, in the alternative, a writ of prohibition, be issued by this court directed to respondent, the Honorable William J. Zloch, Judge of the U.S. District Court for the Southern District of Florida as prayed for in the Statement of Relief Sought, and for such other and further relief as the Court may deem proper.

Dated this 1st day of October, 1987.

Respectfully submitted,

Bernard J. Dolenz

CERTIFICATE OF SERVICE

A copy of the foregoing was sent this 1st day of October, 1987 to William J. Zloch, U.S. District Judge, Room 202B, 299 East Broward Blvd, Fort Lauderdale, FL 33301 by Express Mail; and by regular mail to Stephen Perry, P. O. Drawer 24, Stuart, FL 33497-0024.

MARINE SPECIALIST
Ray Seese
40 SW Hideaway Place
Stuart, FL 33497
Consulting

# SURVEY REPORT

SUMMARY:

...This vessel ...has never been completely finished or commissioned...] Modifications to the vessel are being considered...The vessel has no standing or running rigging...The work to complete and commission this vessel is being done by Stuart Yacht Builders of Stuart, Flroida. It is recommended that when the vessel is completed a survey to update these findings and a sea trial be conducted.

(Statements of Plaintiff's expert)

# One of world's largest catamarans is in Stuart

• From page A1

purchased it.

The family worked on the boat for several years, doing the electric work, installing two 453 GM Diesels, and completing much of the finish work, said Burdick.

Burdick estimates the boat is about 70 percent completed.

But for personal reasons the couple was unable to finish the job and two years ago they moved out of the state, leaving the Aries moored in a small creek of the South Fork.

The fiberglass-sheathed, double-planked mahogany construction is still perfect, said Burdick, and if the sale and survey goes well, it's the plan of the new owners to completely redo the boat and turn it into the show piece it was meant to be.

A lot of redesigning is planned.

Originally the boat was built for